Petition

81-1691

Office - Supreme Court, U.S.
FILED
MAR 12 1982
ALEXANDER L. STEVAS
CLERK

NO.

in the Supreme Court of the United States

OCTOBER TERM, 1981

KENNETH GERALD CHEATHAM,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Law Offices of
MILTON E. GRUSMARK, P.A.
Attorneys for Petitioner
3628 N.E. Second Avenue
Miami, Florida 33137
Tele.: (305) 576-6590

QUESTIONS PRESENTED

I

WHETHER A DEFENDANT'S SIXTH AMENDMENT RIGHT TO SUBPOENA WITNESSES CAN BE USED TO DENY A DEFENDANT HIS SIXTH AMENDMENT RIGHT TO CROSS-EXAMINE WITNESSES.

II

WHETHER PETITIONER WAS DENIED HIS DUE PROCESS RIGHTS WHEN HE WAS CONVICTED OF A CRIMINAL OFFENSE DESPITE THE FACT THAT HIS GUILT WAS NOT PROVEN BEYOND A REASONABLE DOUBT.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES INVOLVED	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE AND FACTS	2
RAISING OF FEDERAL QUESTION	3
REASONS FOR GRANTING WRIT	4
I	
WHETHER A DEFENDANT'S SIXTH AMENDMENT RIGHT TO SUBPOENA WITNESSES CAN BE USED TO DENY A DEFENDANT HIS SIXTH AMENDMENT RIGHT TO CROSS-EXAMINE WITNESSES	4

TABLE OF CONTENTS (Continued)

Page

II

WHETHER PETITIONER WAS DENIED HIS DUE PROCESS RIGHTS WHEN HE WAS CONVICTED OF A CRIMINAL OFFENSE DESPITE THE FACT THAT HIS GUILT WAS NOT PROVEN BEYOND A REASONABLE DOUBT 9

CONCLUSION 15

CERTIFICATE OF SERVICE 16

TABLE OF AUTHORITIES

Page

Alford v. United States,
282 U.S. 687, 51 S.Ct. 218,
75 L.Ed. 624 (1948) 8

Araujo-Lopez v. United States,
405 F.2d 466 (5th Cir. 1969) 10

Davis v. Alaska,
415 U.S. 308, 94 S.Ct. 1105,
39 L.Ed. 347 (1974) 6

In re: Winship,
90 S.Ct. 1068, 397 U.S. 358 (1970) 13

Jackson v. Virginia,
99 S.Ct. 2781 (1979) 9

Pointer v. Texas,
380 U.S. 400, 85 S.Ct. 1065 (1965) 5

United States v. Di Re,
332 U.S. 581, 66 S.Ct. 222,
92 L.Ed. 210 (1948) 10

United States v. Ferg,
404 F.2d 914 (5th Cir. 1974) 10, 12

United States v. Martin,
483 F.2d 974 (5th Cir. 1973) 10, 12

TABLE OF AUTHORITIES (Continued)

Page

United States v. Stephenson,
474 F.2d 1353 (5th Cir. 1973) 10, 11

OTHER AUTHORITIES:

Sixth Amendment of the
United States Constitution 4

OPINIONS BELOW

On May 6, 1981, the Fourth District Court of Appeals filed its opinion affirming the Judgment and Conviction in this case. On January 12, 1982, the court denied Petitioner's Motion for Rehearing and Motion for Rehearing en banc (a copy of these opinions are attached to the Appendix of this Petition).

JURISDICTIONAL STATEMENT

On May 6, 1981, the Fourth District Court of Appeals filed its opinion affirming the Judgment and Conviction in this case. On January 12, 1982, the court denied Petitioner's Motion for Rehearing and Motion for Rehearing en Banc.

This Court has jurisdiction to review this case pursuant to 28 U.S.C. §1257(3) and Rule 17(1)(b) and (c) of the Supreme Court Rules.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

The Sixth Amendment and the Fourteenth Amendment to the United States Constitution are involved in this Petition. The complete text of these constitutional provisions are included in the Appendix to this Petition.

STATEMENT OF THE CASE AND FACTS

On July 8, 1978, Petitioner Cheatham was charged by information in St. Lucie County, Florida, with one count of unlawful possession with intent to deliver marijuana. Petitioner pled not guilty and was tried by a jury. On February 26, 1980, he was adjudged guilty and sentenced to three years imprisonment followed by seven years probation.

On or about March 21, 1980, Petitioner filed his Notice of Appeal in the Florida Fourth District Court of Appeal. On May 6, 1981, the appellate court affirmed the judgment and conviction, per curium without an opinion.

On May 15, 1981, Petitioner filed a motion for rehearing and a motion for rehearing en banc. These motions were denied on January 12, 1982.

The record reflects the fact that on June 25, 1978, a roadblock was set up in Fort Pierce, Florida. At that time, Officer Ritter had been following a white Chevrolet van. The van pulled off the road prior to reaching the roadblock and both the driver and passenger left the van.

Officer Ritter approached Petitioner Cheatham, who was the driver and asked him to produce his license and registration. While Petitioner was looking for his registration, Officer Ritter allegedly detected an odor that he thought was marijuana. After speaking to another officer, Officer Ritter arrested Petitioner Cheatham. Officer Ritter testified to all of these facts on direct examination.

After arresting Petitioner, Petitioner immediately stated to the officer that he had no idea what was in the back of the truck. Later, at the sheriff's office, Petitioner Cheatham again stated that he had no idea what was in the back of the van and that he was only paid a sum of money to drive the van from one location to another.

On direct examination, the State failed to elicit any of these relevant statements from Officer Ritter. Counsel for Petitioner, on cross-examination, tried to elicit this information. However, the trial court refused to allow Petitioner's counsel to cross-examine on this issue. Instead, the trial court instructed counsel for Petitioner that he had the power to subpoena Officer Ritter as his own witness and at that time could inquire about the statements made by Petitioner.

It should be noted that Petitioner never made any statement indicating that he had knowledge of the contraband in the van.

RAISING OF FEDERAL QUESTION

This Petition deals with the denial of Petitioner's Sixth Amendment right to cross-examine witnesses and Fourteenth Amendment right to be free from conviction unless the State proves his guilt beyond a reasonable doubt.

At the trial of this case, counsel for Petitioner specifically objected to the trial court's denial of his right to cross-examine witnesses when the judge refused to allow counsel to adequately cross-examine the key

witness in the case (TR 191, TR 197). This issue was also raised on appeal before the Fourth District Court of Appeals of Florida.

At the end of the trial, counsel moved for a Judgment of Acquittal based on the fact that there was insufficient evidence to convict Petitioner. Counsel for Petitioner also raised this issue on appeal.

REASONS FOR GRANTING WRIT

I

WHETHER A DEFENDANT'S SIXTH AMENDMENT RIGHT TO SUBPOENA WITNESSES CAN BE USED TO DENY A DEFENDANT HIS SIXTH AMENDMENT RIGHT TO CROSS-EXAMINE WITNESSES.

Question I presented in this Petition presents an issue of federal law which has not been, but should be, settled by this Court. The trial court in this case ruled that a defendant's Sixth Amendment right to cross-examine a witness can be abridged by a defendant's Sixth Amendment right to subpoena witnesses. This Court has never decided whether a defendant's right to subpoena witnesses can be used to deny a defendant his Sixth Amendment right to call witnesses.

The Sixth Amendment of the United States Constitution states in part:

> In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .

In *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065 (1965), the Supreme Court held:

> It cannot seriously be doubted at this late date that the right of cross examination is included in the right of an accused in a criminal case to confront the witnesses against him. And probably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross examination in exposing falsehood and bringing out the truth in the trial for a criminal case.

The court went on to state:

> There are few subjects perhaps upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.

In this case, the State of Florida introduced as a witness, Officer Ritter, who was the arresting officer. Officer Ritter testified on direct examination that Mr. Cheatham told him that at the time of arrest, he did not know what was in the van nor where it was going. On cross-examination, counsel for Petitioner tried to bring out the fact that numerous other statements were made subsequent to the arrest wherein Petitioner Cheatham had stated that he was paid $1,000.00 to drive a truck and that he had no knowledge of the contents of the truck. The trial court refused to permit

Petitioner's counsel to inquire in this area of cross-examination.

It is clear from the charge in this case that any statement concerning Petitioner's knowledge of the contents of the van would be most relevant to the innocence or guilt of Petitioner.

By not allowing Petitioner to cross-examine Officer Ritter concerning both the contents of Petitioner Cheatham's statements and the reason why Officer Ritter chose to hide these statements from the jury, the trial court clearly hindered Petitioner's right to cross-examination.

In *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed. 347 (1974), the United States Supreme Court once again recognized the fact that if a defendant is denied his right to adequate cross-examination, he is effectively denied his right to a fair trial as guaranteed by the Sixth Amendment to the United States Constitution. The court quoted the following relevant passage from Professor Wigmore:

> The main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.* The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon him, but for the purpose of cross-examination, which cannot be had except by the direct personal putting of questions and obtaining immediate answers. (Emphasis added in original.) 5 J. Wigmore, Evidence §1395, p. 123 (3d ed. 1940).

In this case, the trial court attempted to alleviate prejudice by informing counsel that if he wanted to inquire about any statements that Officer Ritter had decided to keep from the jury, he had the right under the Sixth Amendment to the United States Constitution to call Officer Ritter as his own witness. In effect, the trial court's ruling results in a new proposition of law which totally destroys a defendant's right to cross-examine a witness. It is obvious that a defendant always has the right to call someone as his own witness. However, any experienced trial lawyer knows that there is a difference between cross-examining a witness and calling an individual as his own witness. Such differences include but are not limited to the fact that on cross-examination an attorney is allowed to ask leading questions and on direct examination he is not. Furthermore, it is important to note that in the State of Florida if a defendant calls a witness he loses the opportunity to have the opening and closing in closing argument.

Thus, the trial judge in this case forced Petitioner to choose between his constitutional right to cross-examine witnesses and his constitutional right to call witnesses: It is apparent from all the Supreme Court cases cited in this Petition that the framers of our Constitution did not intend for the right of cross-examination to be destroyed by the right to subpoena witnesses.

By not permitting Petitioner's counsel to properly cross-examine the State's chief witness in this case, the jury was deprived of essential information relevant to the innocence or guilt of Petitioner. Therefore, Petitioner's Sixth and Fourteenth Amendment rights to a fair trial were violated.

In *Alford v. United States*, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1948), the Supreme Court of the United States once again recognized the importance of cross-examination when the court held:

> It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and credibility to a test, without which the jury cannot fairly appraise them. * * * To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial.

Since no court before this case has ever held that a defendant's right to cross-examine witnesses could be denied based on his right to subpoena witnesses, it is respectfully urged that this court issue the writ in this case in order to determine whether one clause of the Sixth Amendment, i.e., the right to subpoena witnesses, can be used to deny another clause of the Sixth Amendment, i.e., the right to cross-examine witnesses.

II

WHETHER PETITIONER WAS DENIED HIS DUE PROCESS RIGHTS WHEN PETITIONER WAS CONVICTED OF A CRIMINAL OFFENSE DESPITE THE FACT THAT HIS GUILT WAS NOT PROVEN BEYOND A REASONABLE DOUBT.

This Court should review this case based on the fact that the state court opinion in this case is in direct conflict with numerous federal and Supreme Court cases. In *Jackson v. Virginia*, 99 S.Ct. 2781 (1979), this Court clearly recognized that a federal constitutional right is denied when a defendant is found guilty of a crime despite the fact that the State has failed to prove every element beyond and to the exclusion of every reasonable doubt.

The issue presented here also raises a serious issue that arises daily in every criminal court in this land. The issue is whether an occupant in a motor vehicle can be convicted of a possessory crime absent any proof that he had knowledge that contraband was in the car. Numerous federal cases have indicated that a conviction cannot stand based on the above-mentioned facts. This Court has never definitively ruled on this issue. This Court's ruling on the quantum of proof necessary to convict an occupant of a motor vehicle containing contraband would certainly benefit the bench and trial bar considerably.

The facts in this case reveal that Petitioner Cheatham was present in a motor vehicle, to-wit: a van, that contained a quantity of marijuana in the rear section of

the van. Petitioner Cheatham was the driver of this van, however, Petitioner Cheatham was not the owner of the van. No evidence introduced at trial connected Petitioner Cheatham to the marijuana, other than the fact that he was present in the van that contained marijuana. The rear section of the van was shielded from view of any front seat occupants by curtains. It was also shielded in the back by curtains to prevent anyone outside from seeing what was inside. Thus, unless the driver or passenger knew in advance that bales of marijuana were in the van, they could not know from observation after the loading.

An analysis of many federal cases clearly reveals that the State in this case failed to introduce evidence beyond a reasonable doubt that Petitioner Cheatham possessed marijuana.

Mere presence at the scene, alone, proves nothing as to possession of or dominion over a drug. See, *United States v. Di Re*, 332 U.S. 581, 66 S.Ct. 222, 92 L.Ed. 210 (1948), *Araujo-Lopez v. United States*, 405 F.2d 466 (5th Cir. 1969); *United States v. Martin*, 483 F.2d 974 (5th Cir. 1973).

In order to convict an individual of possession of marijuana, the Government, or in this case the State, must prove that the defendant was either in actual possession or in constructive possession. The state must show ownership, dominion or control of the illegal drug. See, *United States v. Stephenson*, 474 F.2d 1353 (5th Cir. 1973); *United States v. Ferg*, 404 F.2d 914 (5th Cir. 1974). Therefore, in this case, since Petitioner clearly was not in actual possession of the marijuana, it was the State's burden to prove that Petitioner Cheatham

had knowledge as well as ownership, dominion or control of the marijuana.

An analysis of three federal cases clearly reveals that the facts in this case were totally insufficient to establish constructive possession.

In *United States v. Stephenson, supra*, a defendant was seen outside a bar. A police officer approached him and searched him. No drugs were found. The officer proceeded to search a room inside the bar where a large quantity of heroin was discovered in envelopes. Defendant's fingerprints were found on seventeen of these envelopes. In reversing the conviction the Fifth Circuit Court of Appeals held:

> *However, whatever the nature of the evidence, it must be such that a jury may reasonable infer that the person charged with constructive possession had dominion and control over the drug. United States v. Mendoza*, 5 Cir. 1970, 433 F.2d 891, 896. *By the same token, mere presence in the area where the narcotic is discovered or mere association with the person who does control the drug or the property where it is located, is insufficient to support a finding of possession. United States v. Davis*, 3 Cir. 1972, 461 F.2d 1026, 1035, 1036; *United States v. Holland*, 1971, 144 U.S.App.D.C. 225, 445 F.2d 701, 703; *Smith v. United States*, 5 Cir. 1967, 385 F.2d 34, 39 n. 16. (emphasis added)

In the instant case there were neither fingerprints nor any other evidence that would connect Petitioner to the marijuana in the back of the van.

In *United States v. Martin, supra*, the defendant was arrested in a room where a drug transaction had taken place. In reversing the conviction, the Fifth Circuit Court of Appeals held:

> To establish constructive possession, however, there must be proof of dominion and control. *Garza v. United States*, 5th Cir. 1967, 385 F.2d 899; *Smith v. United States*, 5th Cir. 1967, 385 F.2d 34. We think this case is squarely governed by the rule that "mere presence in the area where the narcotic is discovered or mere association with the person who does control the drug or the property where it is located, is insufficient to support a finding of possession." *United States v. Stephenson*, 5th Cir. 1973, 474 F.2d 1353 [1973]. The evidence here is clearly insufficient.

As the defendant in the Martin case, Petitioner Cheatham was only shown to have been present in an area that contained an illegal substance. This clearly is insufficient to convict.

Finally, in the case of *United States v. Ferg, supra*, defendant Ferg was present with another individual in a motor vehicle that contained marijuana. In reversing the conviction, the Fifth Circuit Court of Appeals ruled that there was no nexus between the defendant and the illegal substance. The court reiterated the long-standing statement of law that mere presence in an area where a narcotic is discovered is insufficient to support a finding of possession. The court said:

> The facts of this case illustrate the logic of this "mere presence" rule. The government presents only two pieces of circumstantial evidence in an attempt to link Ferg with the seized marijuana. Ferg was traveling with Shaw, the person who admitted having purchased the marijuana, and Ferg was a passenger in the car in which the marijuana was concealed. Beyond the admission by Ferg that he was a traveling companion of one guilty of illegal possession of marijuana, the government failed to establish that Ferg in any way violated 21 U.S.C. §841(a)(1). The government's evidence failed to prove that Ferg had ever maintained possession of the contraband or had any intention of participating in the distribution of it.

In this case, there was no evidence of Petitioner Cheatham's possible guilt other than the fact that he was driving a van that contained marijuana. Clearly under federal law, the evidence introduced at trial was insufficient to establish guilt beyond and to the exclusion of every reasonable doubt and would justify the granting of this Petition for Writ of Certiorari.

The United States Supreme Court in the case of *In re: Winship*, 90 S.Ct. 1068, 397 U.S. 358 (1970), stated the importance of requiring the Government to prove a defendant guilty beyond a reasonable doubt when the court stated:

> The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interest of immense

> importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is a reasonable doubt about his guilt.

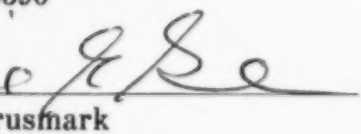
The court went on to emphasize the fact that a failure to prove a defendant guilty beyond a reasonable doubt is clearly a constitutional violation when the court held:

> Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

CONCLUSION

Based on the foregoing, it is urged that this Court grant certiorari in this case.

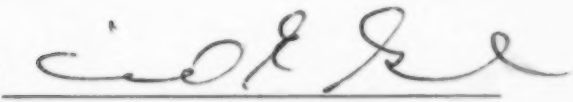
Law Offices of
MILTON E. GRUSMARK, P.A.
Attorneys for Petitioner
3628 N. E. Second Avenue
Miami, Florida 33137
Tele.: (305) 576-6590

By: 
Milton E. Grusmark

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari was mailed to the Office of the United States Solicitor General, Department of Justice, Washington, D.C. 20530, and to Florida Attorney General's Office, 401 N.W. 2nd Avenue, Suite 820, Miami, Florida 33128.

Law Offices of
MILTON E. GRUSMARK, P.A.
Attorneys for Petitioner
3628 N.E. Second Avenue
Miami, Florida 33137
Telephone: (305) 576-6590

BY /s/ 
MILTON E. GRUSMARK

Appendix

TABLE OF CONTENTS

	Page
Opinion of Fourth District Court of Appeal affirming Judgment and Conviction	1
Order denying Petitioner's Motions for Rehearing	3
Sixth Amendment to the United States Constitution	4
Fourteenth Amendment to the United States Constitution	5

[Received May 7 1981]

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

JANUARY TERM 1981

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING PETITION
AND, IF FILED, DISPOSED OF.

CASE NOS. 80-559 and 80-560

JAMES KANSINGER JONES
and KENNETH GERALD CHEATHAM,
Appellants,

v.

STATE OF FLORIDA,
Appellee.

Decision filed May 6, 1981

Consolidated appeals from the Circuit Court for St. Lucie County; Royce R. Lewis, Judge.

Milton E. Grusmark, Law Offices of Milton E. Grusmark, P.A., Miami, for appellant, Cheatham; and Lee E. Muschott of Brennan and Muschott, Fort Pierce, for appellant, Jones.

Jim Smith, Attorney General, Tallahassee, and Paul H. Zacks, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

AFFIRMED.

BERANEK and HERSEY, JJ., and WARREN, LAMAR, ASSOCIATE JUDGE, concur

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA FOURTH DISTRICT

CASE NO. 80-559
80-560

JAMES KANSINGER JONES and
KENNETH GERALD CHEATHAM,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

January 12, 1982

BY ORDER OF THE COURT:

ORDERED that the Appellants' May 21, 1981 Motions for Rehearing are denied.

I hereby certify the foregoing is a true copy of the original court order.

/s/ Clyde L. Heath
CLYDE L. HEATH,
CLERK

cc: Milton E. Grusmark, Esq.
Brennan & Muschott
Attorney General

AMENDMENT VI

Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defense.

AMENDMENT XIV

§1. Citizenship rights not to be abridged by states.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.